'The MV Hong Leong'; Owners of the Ship MV Hong Leong v Owners of the Ship MT Man Hua No 3 & Anor

HIGH COURT (KUCHING) — ADMIRALTY IN REM NO KG8 OF 1986
ABDUL KADIR SULAIMAN J
6 OCTOBER 1994

Shipping and Navigation *— Merchant shipping — Collision between towed barge and ship lying at anchor — Liability of owner of towed barge — Merchant Shipping (Collision Regulations) Order 1984*

Evidence *— Documentary evidence — Exhibits tendered not disclosed in lists of documents — Whether ran foul of rules as to discovery*

The plaintiff is claiming against the first and second defendants for special damages, interest and costs arising out of a collision at sea between his ship, MV Hong Leong, and the second defendant's dumb steel barge under the tow of the first defendant's ship. The issue before the court was whether the second defendant, who was the owner of the barge, was liable for the collision with the plaintiff's ship while under the control of the agents or servants of the first defendant in towing the dumb barge while in the course of its business and while not under the direction of the owners of the barge or their agents or servants.

Counsel for the plaintiff also submitted that certain exhibits ('the exhibits') tendered by the second defendant were not admissible as they were not disclosed by the second defendant in the lists of documents and as such, the second defendant had run foul of the rules as to discovery.

Held, allowing the plaintiff's claim against the first defendant but dismissing the plaintiff's claim against the second defendant:

(1) The collision occurred on account of the negligent act of the first defendant's ship in navigating its tow, a dumb barge. Although in applying the Merchant Shipping (Collision Regulations) Order 1984, the court usually treats the tug and her tow as one ship, it was evident that at the material time, the barge was under the control and management of the servants or agents of the first defendant. Therefore, the first defendant must be responsible for the natural consequences of the tug being wrongly steered which resulted in the collision with the plaintiff's ship. The 'one ship' rule does not apply in the present case. As a result, the second defendant, being the owner of the barge, cannot be made liable for the act of the first defendant or its agents or servants.

(2) The court reject the exhibits tendered by the second defendant as this would defeat the purpose of discovery which is to enable

each party to use, before or at the trial, relevant documentary materials to support or to rebut the case made by or against him; to prevent surprise at or before the trial relating to documentary evidence; and to reduce the cost of litigation.

[Bahasa Malaysia summary

Plaintif membuat tuntutan terhadap defendan pertama dan kedua untuk ganti rugi khas, faedah dan kos yang timbul akibat suatu perlanggaran di laut di antara kapalnya, MV Hong Leong, dan baj keluli tidak bermotor kepunyaan defendan kedua yang sedang ditunda oleh kapal defendan pertama. Isu di hadapan mahkamah adalah sama ada defendan kedua, yang merupakan pemilik baj itu, bertanggungjawab untuk perlanggaran dengan kapal plaintif itu apabila bajnya berada di bawah kawalan agen atau pekerja defendan pertama semasa menjalankan perniagaannya dan semasa ianya tidak berada di bawah arahan pemilik baj atau agen dan pekerjanya.

Peguambela untuk pihak plaintif juga telah berhujah bahawa beberapa ekshibit ('ekshibit itu') yang telah dikemukakan oleh defendan kedua, tidak boleh diterima kerana mereka tidak didedahkan oleh defendan kedua di dalam senarai dokuman dan oleh itu, defendan kedua telah menyalahi keadah penzahiran.

Diputuskan, membenarkan tuntutan plaintif terhadap defendan pertama tetapi menolak tuntutan plaintif terhadap defendan kedua:

(1) Perlanggaran itu berlaku kerana kecuaian kapal defendan pertama apabila mengemudi tundaannya, iaitu sebuah baj tidak bermotor. Walaupun, apabila memakai Merchant Shipping (Collision Regulations) Order 1984, mahkamah biasanya menyifatkan kapal tundaan dan tundaannya sebagai satu kapal, adalah jelas bahawa pada masa yang penting, baj itu berada di bawah kawalan dan pengurusan pekerja atau agen defendan pertama. Oleh itu, defendan pertama mestilah bertanggungjawab untuk akibat semula jadi tundaan itu dipandu secara salah yang mengakibatkan perlanggaran dengan kapal plaintif itu. Kaedah 'satu kapal' itu tidak terpakai di dalam kes ini. Oleh itu, defendan kedua, yang merupakan pemilik baj itu, tidak bertanggungjawab untuk perbuatan defendan pertama atau agen atau pekerjanya.

(2) Mahkamah telah menolak ekshibit yang telah dikemukakan oleh defendan kedua kerana ini akan menggagalkan tujuan penzahiran yang sepatutnya membolehkan setiap pihak mengguna dokumen yang relevan untuk menyokong atau untuk mematahkan kes yang telah dibuat oleh atau terhadapnya sebelum atau semasa perbicaraan itu; untuk mengelakkan kejutan berkaitan dengan keterangan dokumentari itu sebelum atau semasa perbicaraan; dan untuk mengurangkan kos litigasi.]

Notes

For cases on collisions at sea, see 11 *Mallal's Digest* (4th Ed) paras 1144–1177; [1992] Mallal's Digest 1603.

Legislation referred to

Merchant Shipping (Collision Regulations) Order 1984
Rules of the High Court 1980 O 35 r 1(2), O 64 r 5

Frank Tan (*Marina Foo* with him) (*Tang & Partners*) for the plaintiff.
CJ Eng (*CJ Eng Advocates*) for the first defendant.
Fabian Lim (*Chua, Khaider Lim & Co*) for the second defendant.

Abdul Kadir Sulaiman J: By an amended statement of claim, the plaintiff claims against both defendants for special damages, interest and costs arising out of a collision at sea between his ship and the second defendant's dumb steel barge under the tow of the first defendant's ship.

The particulars of damages as pleaded are:

(a)	Cost of repairs	RM 80,145.12 (S$58,245.00)
(b)	Estimated loss of profits the period MV Hong Leong on dry dock for repairs	RM 60,000.00
(c)	Estimated value of general cargoes contaminated	RM 20,000.00
(d)	Survey fees for damage	RM 4,000.00
	Total	RM164,145.12

By way of a counterclaim, the second defendant claims against the plaintiff and the first defendant for special damages, interest and costs arising out of the said collision and against the first defendant for indemnity in the event the plaintiff succeeds in the claim.

However, no more is to be said on the counterclaim of the second defendant as by a court order dated the 27 August 1988, the said counterclaim was dismissed summarily with costs to the plaintiff to be taxed. What is left to be considered, therefore, is the claim of the plaintiff against both the defendants.

As for the first defendant, at the commencement of the hearing, he was represented by counsel. Subsequently, with the leave of the court, the counsel was discharged and he was informed of the continued hearing. However, he chose not to appear at all. Pursuant to O 35 r 1(2) of the Rules of the High Court 1980 ('the RHC'), the hearing proceeded in his absence.

This action of the plaintiff arose out of a collision on 9 March 1986 at about 5.45am between the plaintiff's ship, MV Hong Leong, while at anchor at Tanjung Po in the sea of Sarawak, and the second defendant's

steel barge, Bosta Jaya Ex THM–182 ('the Bosta Jaya'), which at the material time was being towed by the first defendant's ship, MT Man Hua No 3. The Bosta Jaya is a dumb barge carrying stones with no one managing it on board. It has no engine and no power of its own to move.

According to PW2, the captain of MV Hong Leong, the ship left Port Klang, Selangor for Kuching on 5 March 1986. On 8 March 1986, at about 9pm, it arrived at a spot, at latitude 1° 45' 36" and longitude 110° 31' 20", which was about two nautical miles from the Tanjung Po lighthouse in Sarawak and laid anchor there due to poor visibility at night before proceeding to Kuching. He ascertained this position by means of a radar at the time when the ship was anchored. During anchorage, two anchor lights and 4 cargo lights were on in the ship. During the anchorage, a chief officer, PW3, was assigned to carry out watch duty. At the time of the collision, he was asleep, but was awakened by the chief officer. When he came out, he saw a ship and its tow, which was subsequently identified as MT Man Hua No 3 with its tow, the Bosta Jaya, attempting to escape from the scene. With the aid of a radio phone, he told the ship which was heading towards the direction of Bintulu to stop. When it refused, MV Hong Leong gave chase for about 1½ hours and directed them to turn back and proceed to Kuching, which they did. At Kuching, he lodged a report with the Marine Department and with the police. After the accident, minor repairs were done to MV Hong Leong to stop the leakage caused by the collision. Major repairs which took about a month were subsequently carried out at the Singapore Slipway and Engineering Co (Pte) Ltd Singapore.

According to PW3, MV Hong Leong's chief officer, on the fateful day, he was on duty on board the ship at the material time. While alone doing watch duty on board, he saw a barge collide with his ship. Before the collision, he saw from about 500yd away, a tug boat approaching the ship. He horned eight times but the boat kept on coming towards the ship. Then he saw the boat avoiding the ship but the barge which it was towing hit the ship twice. He corroborated the evidence of PW2 that after the collision, the boat did not stop and the ship gave chase and subsequently, they all proceeded to Kuching.

PW5 is a 'pegawai laut' with the Marine Department in Kuching. In his evidence, he testified that when a vessel is at anchor, it is required to show at least one anchor light in the fore of the vessel, white in colour and visible for 360°. If the length of the vessel is more than 100 meters, it is required to exhibit another light at the stern and visible for 360° as well for at least two nautical miles. According to him, when one sees an anchor light, one must keep out of the way of the anchored vessel. Under the Merchant Shipping (Collision Regulations) Order 1984, when someone on deck senses imminent danger, he is required to sound at least 5 short rapid blasts of his horn or whistle or call on his VHF radio channel 16 to call out the approaching vessel or, if he has time, to get ready with some fenders to reduce the impact of the collision or open anchor brake and release the anchor chain to reduce the impact.

PW1 was the repair manager of Singapore Slipway and Engineering Co (Pte) Ltd Singapore. He confirmed that in 1986, the company repaired MV Hong Leong and he produced an invoice, exh P2–7, for S$58,245 in regard to the cost of repair of the ship. To the best of his knowledge, the amount charged had been paid by the plaintiff to his company. A

For the second defendant, the managing director of Borneo Shipping & Timber Agencies Sdn Bhd, Bintulu, Sarawak, the owner of the dumb barge, Bosta Jaya, gave evidence. According to him, in July 1985, the company chartered the barge to Liang Ann Shipping Sdn Bhd. Exhibit D1 is the Timber/Barge Boat Charter Contract No LAS/BSTA/85/1 dated 15 July 1985. According to D1, the barge was chartered for a minimum period of six months commencing from 22 July 1985 to 21 January 1986 and thereafter on a day to day/month basis unless mutual agreement was reached otherwise. According to clause 6 of the agreement, the charterers shall be wholly and solely responsible for any damage caused by the said barge to the property of any third party. Clause 19 of the same stipulates that the charterers shall indemnify the owners against all and any liabilities and claims of whatsoever nature and however arising in connection with the vessel claimed against the owners or imposed upon the vessel at any time during the charter period. According to the witness, MT Man Hua No 3, the tug boat that towed the dumb barge at the material time of the collision, is owned by Liang Ann Co Sdn Bhd. According to exhs D20 and D21, one Mr Wong Ding Ang and his wife, Tan Suk Hung are directors of both Liang Ann Shipping Sdn Bhd and Liang Ann Co Sdn Bhd. On 9 March 1986, the barge was still on charter to Liang Ann Shipping Sdn Bhd on a monthly basis as was provided in the charter agreement. B C D E

Those were the evidence collected during the trial, for both the plaintiff and the second defendant. As for the first defendant, as mentioned earlier, he was represented by counsel when the hearing commenced on 28 September 1993 when the evidence of PW1 was completed. The learned counsel for the first defendant had earlier on, on 14 September 1993, filed an application for withdrawal of solicitor as she was unable to contact the first defendant despite several attempts since 1990 for instructions. However, she was prepared to go on with the trial up to the completion of the evidence of PW1 only, but not with further evidence due to lack of instructions from the first defendant. After the recording of the evidence of PW1, I adjourned the hearing to 3 May 1994. I also made an order for substituted service upon the first defendant of the continuation of the hearing of the suit on 3 May 1994 and the hearing of the application for the withdrawal of solicitor on 6 January 1994. On 6 January 1994, the application for the discharge of the counsel came up for hearing and the first defendant was absent though served by way of substituted service. The court, accordingly, made a declaration that the solicitor had ceased to be the solicitor acting for the first defendant in the suit, pursuant to O 64 r 5 of the RHC. When the suit came up for continued hearing on 3 May 1994, the first defendant was again absent though duly served by way of substituted service. So the continued hearing proceeded as scheduled. By F G H I

A the close of the case for the defendants, no evidence was adduced by or on behalf of the first defendant.

At the end of the trial, learned counsel for the plaintiff abandoned items (b), (c) and (d) of the particulars of damages claimed, leaving only item (a) thereof for estimated costs of repair of RM80,145.12. From the B evidence, I am satisfied that the collision occurred on account of the negligent act of the first defendant's ship in navigating its tow, the Bosta Jaya, a dumb barge. As such I find the first defendant liable to the plaintiff. In managing its affairs under the circumstances at the material time having the dumb barge, Bosta Jaya, in its control, MT Man Hua No 3 clearly owed a duty of care to avoid the collision between its tow and the plaintiff's C ship. From the evidence, I am satisfied that the first defendant had failed to discharge this duty of care and that the first defendant is liable to the plaintiff. As for the owner of the barge, ie the second defendant, the learned counsel for the plaintiff submitted that the second defendant is also liable because of its collision with the plaintiff's ship. According to D him, in applying the collision regulations, the court usually treats the tug and her tow as one ship. As such, prima facie, the relation between the tow and the tug is said to be that the tug is the servant or in the service of the tow. Various authorities were cited. Having considered the authorities, I am of the view that those authorities are not in point with the present set of facts and circumstances presented to me. In the circumstances, I cannot E accept this line of submission. Marsden, *Collision at Sea* and 43 *Halsbury's Laws of England* (4th Ed) at p 170 para 226 has this to say:

> The principle of admiralty law stated in a number of the older cases, that where one ship is in tow of another, the two ships are, for some purposes, by intendment of law, regarded as one, the command or governing power F being with the tow and the motive power with the tug, must now be regarded as overruled, and it must now be taken as conclusively established that the question of the identity of the tow with the tug that tows her, is one of fact, not law to be determined upon the particular facts and circumstances of each case.

G What is gathered from the facts disclosed in the evidence is that, at the material time, the barge was out of the control of its owners. By the charter agreement, they had no more control over the barge during the charter period. It is from the evidence that at the material time, the barge was under the control and management of the servants or agents of the first defendant. The first defendant must be responsible for the natural H consequences of the tug being wrongly steered resulting in the collision with the plaintiff's ship. The 'one ship' rule will not apply in the present case. Except for the fact that this accident happened in the sea, what if on land, a lorry owner hires a trailer from a third party and has this trailer attached to his lorry. In the course of driving the lorry with its trailer, an accident happens owing to the negligent conduct of those concerned with I the lorry, whereby the trailer hits the lorry of the plaintiff. In those circumstances, can it be said that the third party who gives his trailer on hire is to be made liable as well to the plaintiff? Thus, in the present case, under the circumstances, the second defendant, being the owner of the

barge, cannot be made liable for the act of the first defendant or its agent or servants. A

The learned counsel for the plaintiff questions the admissibility of exh D1 which is the charter agreement entered into between Liang Ann Shipping Sdn Bhd, the charterer, and Borneo Shipping & Timber Agencies Sdn Bhd, Bintulu, Sarawak, wherein DW1 is the managing director, as owners of the barge. The objection is because according to the statement of the second defendant, the barge was chartered to the owner of MT Man Hua No 3 (which is Liang Ann Co Sdn Bhd). No doubt, in law, each of the two companies has an identity of its own. But this is well explained by DW1 and supported by exhs D20 and D21 and as commonly happens with some local Chinese businessmen that because the two companies are under the control of the same persons, they would allow interchangeability in their accounting procedures. By that, I mean the transaction of one company is reflected in the accounts of another and vice versa. They do not conform to the strict rule of the distinct identity of individual companies. According to the evidence of DW1, one Mr Wong Ding Ang, the director of both the companies told him that both the companies were one and the same and for that reason, rentals in respect of the barge by Liang Ann Shipping Sdn Bhd are paid by Liang Ann Co Sdn Bhd. Under those circumstances, I would not consider the defect in the defence of the second defendant that the barge was chartered to the owners of MT Man Hua No 3 which is Liang Ann Co Sdn Bhd instead of Liang Ann Shipping Sdn Bhd as evidenced by the charter agreement, as being fatal to the second defendant. In any event, the immediate issue before the court is not one of contract but one on the issue of whether the owner of the barge, as the second defendant, in the circumstances of the evidence before the courts, is to be liable for its collision with the plaintiff's ship while under the control of the agents or servants of the first defendant in towing the said dumb barge while in the course of its business while not under the direction of the owners of the barge or their agents or servants. They have no one on board the barge to manage its affairs. In the circumstances, the defect in the particular pleading of the second defendant cannot be said to be fatal to the issue. B C D E F G

On the submission by the learned counsel for the plaintiff as to the admissibility of exhs D2 to D19 tendered by the second defendant, I would agree with the submission that those exhibits are not admissible as they were not disclosed by the second defendant in the lists of documents and as such, the second defendant has run foul of the rules as to discovery. As such, I would reject the exhibits. The introduction of those exhibits by the second defendant during the trial would defeat the purpose of discovery which are threefold: H

(1) to enable each party to use before the trial or to adduce any evidence at the trial relevant documentary materials to support or to rebut the case made by or against him; I

(2) to prevent surprise at or before the trial relating to documentary evidence; and

(3) to reduce the cost of litigation.

A In the circumstances of the case, I hold that the second defendant, as the owners of the dumb barge, Bosta Jaya, is not liable for its collision with the plaintiff's ship on account of the negligent conduct of the servants or agents of the first defendant. Hence, the action against the second defendant must be dismissed.

B Having found the first defendant liable to the plaintiff, what is left to be determined is the amount of damages due to the plaintiff. I am satisfied that the plaintiff has satisfied the court as to the amount of damages due from the first defendant being the cost of repair to the ship caused by the collision amounting to RM80,145.12 as claimed. In the circumstances, I order the first defendant to pay to the plaintiff the said sum with interest C and costs. The action against the second defendant is dismissed with costs.

Order accordingly.

Reported by Jeanne Tan

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